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safety subdivision is given the authority to enforce the same in place of said governmental subdivision.

It is therefore my opinion:

1. It is not mandatory for the Commissioner of Labor to delegate to any city or town or other governmental subdivision the authority set out in subsection (b) of Section 5 of Chapter 232 of the Acts of the General Assembly of 1951.

2. The Commissioner may, if he so desires, delegate only that which he has been specifically authorized to delegate and that is the authority to enforce and carry out the provisions of subsections 5, 6, 7, 8 and 9, or any portion thereof as may be designated by him.

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### OFFICIAL OPINION NO. 55

July 20, 1953.

Mr. Ross Teckemeyer, Executive Secretary,  
Public Employes' Retirement Fund,  
747 Board of Trade Building,  
Indianapolis 4, Indiana.

Dear Mr. Teckemeyer:

Your letter of June 12, 1953 has been received in which you request an official opinion as to the following:

"Is the position of policeman in a city which has not put into operation a police pension fund eligible for social security coverage where the city has adopted a plan covering all positions not covered by an existing pension plan?"

The Acts of the General Assembly of 1925, Chapter 51, as amended, as found in Burns' Indiana Statutes Annotated (1950 Repl.), Section 48-6401 provides in part:

"In every city except cities of the first class there shall be and is hereby created a police pension fund."

The word "shall" is to be considered in the light of its ordinary common use meaning unless some other use is indicated

in the statutes or place in which it is used. It is my opinion that the word "shall," as used in the above section, is to be construed as mandatory and not discretionary and therefore there is imposed a duty upon the city officials of every city, except cities of the first class, to set up a police pension fund.

In a Missouri statute where the word "shall" was used in a statute creating rights for the public or persons the court said that the word "shall" in a statute is imperative where public or persons have rights which ought to be exercised or enforced.

State *ex rel.* Carpenter v. City of St. Louis (1918),  
318 Mo. 870, 2 S. W. (2d) 713.

That an action of mandamus will lie with a public officer or officers having a duty to perform, was stated thus in the case of Stevens, Trustee v. State *ex rel.* Alexander (1947), 224 Ind. 688, 70 N. E. (2d) 632:

"One who requests a mandate must show a clear legal right to the relief that is sought, and a clear legal duty on the officer to perform the function that is to be mandated."

It must be a duty which the law specifically enjoins or some duty resulting from an office.

Gruber v. State *ex rel.* Welliver (1929), 201 Ind. 280,  
168 N. E. 16.

The Indiana Supreme Court in the case of State *ex rel.* Glenn v. Smith *et al.* (1949), 228 Ind. 599, 87 N. E. (2d) 813 said:

"It is not necessary that a statute should in direct terms declare the duty of an officer, in order to make it an imperative one. The duty may be deduced from the general provisions and scope of the statute, regard being had to the evil intended to be remedied, and the object sought to be accomplished."

In this problem the applicable federal authority is found in U. S. C. A., Title 42, Section 418, Sub-section d which is stated:

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“(d) No agreement with any State may be made applicable (either in the original agreement or by any modification thereof) to any service performed by employees as members of any coverage group in positions covered by a retirement system on the date such agreement is made applicable to such coverage group.”

This is somewhat clarified by the legislative history as found in U. S. Code Congressional Service of the 81st Congress, Second Session, Volume 2, Page 3292 which is as follows:

“(e) Employees of State and local governments: Covered only if not under a retirement system and if State enters into an agreement with the Federal Government. All public employees under a retirement system would be excluded on a mandatory basis.”

It should be noted that the above sections specifically state that only those persons who are covered by an existing pension or retirement plan are not eligible for coverage under Federal social security. It is evident, therefore, that any policeman who because of age, health or other reasons which would prohibit him from being eligible for the retirement or pension plan under the Indiana law would not be “members of any coverage group” of the state retirement system and would not be disqualified from participating under Federal social security.

Taking into consideration the above quoted excerpts of statutes and cases as set out above, and having come to the conclusions that Burns' Indiana Statutes Annotated, Section 48-6401 creates a police pension plan in every city except cities of the first class and that all persons who are not otherwise, by reasons of age, health, etc. disqualified, are covered, it is my opinion that:

1. A policeman who by reason of health, age, etc. is not eligible to participate in the police pension fund is eligible for social security.

2. A policeman who is eligible for the police pension fund, even though it has not been put into operation, is not eligible for social security.